The Government of India v Cairn Energy India Pty Ltd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-7 OF 2010(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), MOHD GHAZALI AND RAUS SHARIF FCJJ
11 OCTOBER 2011

Arbitration — Agreement — Choice of law — Whether parties may agree to apply foreign law to govern arbitration — Whether curial law ought to be that of seat of arbitration — Contract governed by laws of India — Arbitration agreement governed by laws of England — Seat of arbitration in Malaysia — Award submitted for review before Malaysian courts — Whether Malaysian law may be applied exclusively to decide scope of intervention

Arbitration — Award — Setting aside — Jurisdiction of High Court — Whether High Court may set aside decision of arbitral tribunal — Whether issue involved a mixed question of fact and law — Whether manifest error of law on fact of award shown — Whether common law limitation between specific reference and general reference in determining scope of intervention valid — Arbitration Act 1952 s 24(2)

The appellant had entered into an oil and gas joint venture with the respondents. A production sharing contract ('PSC') was entered into by the parties to this effect. The parties chose Indian law as the proper law of the contract and English law as the law to govern the arbitration agreement. Under the PSC, the arbitration proceedings were to be governed by the UNCITRAL Model Law, and that the seat of the arbitration proceedings was to be Kuala Lumpur. Dispute arose regarding the costs recoveries claimed by the respondents and the calculation of post tax rate of return ('PTRR') as computed by the respondents. The parties referred six points for arbitration. Four of them were decided in favour of the appellant and the remaining two were decided in favour of the respondents. The respondent applied to the High Court, Kuala Lumpur to set aside and/or to remit for the reconsideration of the arbitral tribunal, of a part of the arbitral award. The learned judicial commissioner found the issue to be a mixed question of fact and law which permitted him to look into the decision of the arbitral tribunal. The learned judicial commissioner in allowing the application concluded that there was a manifest error of law on the fact of the award and that the arbitral tribunal had erred in coming to its decision. The respondents appealed to the Court of Appeal which set aside the High Court's decision. The appellant was granted leave to appeal to the Federal Court on, inter alia, the following questions: (i)

Where an award from an international commercial arbitration is submitted for review before the Malaysian courts under s 24(2) of the Arbitration Act 1952, and the contract provides for the application of one foreign law to govern the contract (namely the laws of India) and another foreign law to govern the arbitration agreement (namely the laws of England), is it proper for the Malaysian Court to apply Malaysian law exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration is in Malaysia? (question 1); (ii) If Malaysian law is to apply to determine the scope of intervention, is the common law limitation adopted in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 between a specific reference and a general reference as determining scope of intervention valid in the light of s 24(2) which carries no limitations by itself or where a construction question is involved? (question 3) (question 1); (iii) Whether the scope of intervention in arbitration awards under Malaysian Law is that stated in *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 given that conflicting positions are presently being taken by the Court of Appeal over the question? For example, the Court of Appeal in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 and *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 has expressly rejected the *Ganda Edible Oils* ratio but the Court of Appeal in *Crystal Realty Sdn Bhd v Tenaga Insurance* [2008] 3 CLJ 791 has endorsed it? (question 4); and (iv) Whether the Court of Appeal, as did the majority arbitrators before them, err in law in failing to appreciate that the paramount rule in the construction of contracts under Indian law is to ascertain the intention of the parties to the bargain and for this purpose rely on the definition to words given in the contract itself as opposed to reliance on commercial sense or industry practice as aids to construction? (question 5).

Held, dismissing the appeal with costs:

(1) Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency (see para 19).

(2) Our courts have taken the view that the seat of the arbitration is the place where challenges to an award are made. The curial law ought to be that of the seat of arbitration. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law was the laws of Malaysia. It is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. As such, question 1 was answered in the affirmative (see paras 25 & 27).

(3) Where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award'. Even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it (see paras 29 & 33).

(4) The construction of an agreement is a question of law. It follows that if the construction of an agreement is the sole matter that is referred to arbitration, it is not open for challenge in the broad sense. Nevertheless, it still may yet be challenged in extremely limited circumstances, ie if the award is tainted with illegality. Question 3 was therefore answered in the affirmative; *Sharikat Pemborong* referred; *King and Duveen and Others* [1913] 2 KB 32 referred; *Ganda Edible Oils* referred; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 referred (see para 36).

(5) There is no conflict between the Supreme Court decision in *Ganda Edible Oils* and the Court of Appeal decisions of *Hartela and Pembinaan LCL*. All three cases can be read harmoniously. Even if there is any conflict between the said cases, the decision of the Supreme Court (as endorsed by the Federal Court in *Intelek Timur*) would prevail. Question 4 was therefore answered in the affirmative (see para 40).

(6) There was nothing to indicate that the majority arbitrators had proceeded on a frolic of their own with total disregard to the PSC. The majority arbitrators rightly dealt with the matter by interpreting the PSC in the manner as the parties had agreed upon. Therefore, the learned majority arbitrators did not base their award on 'commercial sense and/or industry practices'. At the very most the majority arbitrators merely mentioned it in passing; as an incidental or supportive ground (see para 49).

(7) The fact that questions of fact were considered by the majority arbitrators was quite immaterial. That by itself did not alter the specific nature of the reference. There were no elements of illegality in the award handed down by the majority arbitrators. They answered the question of law as was put to them and that was all that was required of them. Question 5 was therefore answered in the negative (see paras 54 & 56).

[Bahasa Malaysia summary

Pemohon memeterai usaha sama minyak dan gas dengan responden-responden. Oleh kerana itu, satu kontrak perkongsian pengeluaran ('KPP') turut dimeterai oleh pihak-pihak. Pihak-pihak memilih

undang-undang India sebagai undang-undang yang bersesuaian dengan kontrak tersebut dan undang-undang Inggeris sebagai undang-undang yang terpakai untuk perjanjian timbang tara. Prosiding-prosiding timbang tara yang terangkum dalam KPP menggunakan 'UNCITRAL Model Law' dan prosiding-prosiding timbang tara tersebut haruslah dijalankan di Kuala Lumpur. Pertikaian timbul berhubung kos-kos pemulihan yang dituntut oleh responden-responden dan pengiraan kadar cukai pulangan pos ('KCPP') seperti yang dikira oleh responden-responden. Pihak-pihak merujuk enam poin untuk timbang tara. Empat daripada mereka memutuskan bagi pihak perayu dan dua orang lagi memutuskan bagi pihak responden-responden. Responden memohon kepada Mahkamah Tinggi Kuala Lumpur untuk mengetepikan dan/atau meremit untuk pertimbangan semula tribunal timbang tara, sebahagian award timbang tara tersebut. Pesuruhjaya kehakiman yang bijaksana mendapati isu tersebut merupakan gabungan persoalan fakta dan undang-undang yang membenarkan beliau untuk menyemak keputusan tribunal timbang tara. Pesuruhjaya sumpah yang bijaksana membenarkan permohonan dengan menyimpulkan bahawa terdapat kesalahan yang nyata dari segi undang-undang berdasarkan fakta award dan bahawa tribunal timbang tara terkhilaf semasa membuat keputusan. Responden-responden merayu kepada Mahkamah Rayuan yang kemudiannya mengetepikan keputusan Mahkamah Tinggi. Perayu diberikan kebenaran untuk merayu kepada Mahkamah Persekutuan berdasarkan, antara lain, persoalan-persoalan berikut: (i) Di mana award daripada timbang tara komersial antarabangsa dikemukakan untuk semakan di hadapan Mahkamah-Mahkamah Malaysia di bawah s 24(2) Akta Timbangtara 1952, dan kontrak memperuntukkan penggunaan undang-undang asing untuk menentukan kontrak tersebut (iaitu undang-undang India) dan undang-undang asing untuk menentukan perjanjian timbang tara (iaitu undang-undang England), adakah mahkamah Malaysia seharusnya menggunakan undang-undang Malaysia secara eksklusif untuk menentukan skop campur tangan dalam award timbang tara atau pertikaian di mana kerusi timbang tara tersebut adalah di Malaysia? (persoalan 1); (ii) Sekiranya undang-undang Malaysia digunakan untuk menentukan skop campur tangan, adakah had masa *common law* yang digunakan dalam *Sharikat Pemborong Pertanian dan Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 di antara rujukan khusus dan umum digunakan bagi menentukan sebagai skop campur tangan adalah sah menurut s 24(2) yang tidak terhad atau di mana persoalan binaan terlibat? (persoalan 3) (persoalan 1); (iii) Sama ada skop campur tangan dalam award-award timbang tara di bawah undang-undang Malaysia adalah seperti yang dinyatakan dalam *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 memandangkan Mahkamah Rayuan sekarang mengambil kedudukan yang berbeza terhadap persoalan tersebut? Sebagai contoh, Mahkamah Rayuan dalam *Hartela Contractors Ltd v Hartecon* [1999] 2 MLJ 481 dan *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 secara nyata menolak nisbah *Ganda Edible Oils* tetapi Mahkamah Rayuan telah menyokong keputusan

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tersebut dalam *Crystal Realty Sdn Bhd v Tenaga Insurance* [2008] 3 CLJ 791? (persoalan 4); dan (iv) Sama ada Mahkamah Rayuan, begitu juga dengan majoriti penimbang tara, terkhilaf dari segi undang-undang apabila gagal untuk menghargai prinsip utama binaan kontrak-kontrak di bawah undang-undang India ialah untuk memastikan niat pihak-pihak untuk tawar-menawar dan bagi tujuan ini, ia bergantung kepada definisi perkataan-perkataan yang dinyatakan di dalam kontrak itu sendiri melawan kebergantungan kepada sudut komersial atau amalan industri sebagai bantuan terhadap binaan tersebut? (persoalan 5).

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah-mahkamah Malaysia sama seperti mahkamah-mahkamah Inggeris, boleh memberi kesan kepada perjanjian pihak-pihak untuk menggunapakai undang-undang asing (sebagai pilihan undang-undang substantif) melawan 'curial law' melainkan apabila penggunaan undang-undang asing bercanggah dengan keadilan atau kesopanan (lihat perenggan 19).

(2) Mahkamah kita mengambil pendekatan bahawa kerusi timbang tara adalah tempat di mana cabaran award perlu dibuat. *Curial law* seharusnya mengenai kerusi timbang tara. Oleh itu, di dalam kes ini Kuala Lumpur dipilih sebagai kerusi perundangan timbang tara, *curial law* merupakan undang-undang Malaysia. Adalah penting bagi pihak-pihak untuk mengikuti peraturan-peraturan mandatori kerusi timbangtara memandangkan permohonan peraturan-peraturan prosedur mandatori kerusi tersebut *(curial law)* akan kekal terikat kepada bidang kuasa dan kawalan kerusi mahkamah-mahkamah timbang tara tersebut termasuklah apabila mempertimbangkan permohonan-permohonan untuk mengetepikan award-award. Oleh itu, persoalan 1 diakui (lihat perenggan 25 & 27).

(3) Apabila perkara khusus dirujuk kepada timbang tara untuk pertimbangan, haruslah dihormati bahawa 'tiada campur tangan dibolehkan berdasarkan alasan keputusan mengenai persoalan undang-undang adalah terkhilaf'. Walau bagaimanapun, sekiranya perkara tersebut merupakan rujukan umum, campur tangan hanya dibolehkan 'sekiranya dan apabila mana-mana kesalahan muncul di permukaan award'. Meskipun rujukan khusus telah dibuat kepada penimbang tara, sekiranya award yang dibuat dicemari ketaksahan, maka ia boleh diketepikan oleh mahkamah atas alasan kesalahan dari segi undang-undang telah berlaku. Pertimbangan terletak kepada mahkamah sama ada untuk menghormati award tribunal timbang tara atau mengubahnya (lihat perenggan 29 & 33).

(4) Binaan perjanjian merupakan persoalan undang-undang. Maka sekiranya binaan perjanjian merupakan perkara utama yang dirujuk

kepada timbang tara, ia tidak terbuka untuk dicabar secara meluas. Namun begitu, binaan perjanjian tersebut masih boleh dicabar dalam keadaan-keadaan yang terhad iaitu, sekiranya award tersebut dicemari oleh kepenyalahan undang-undang. Oleh itu, persoalan 3 diakui; *Sharikat Pemborong*; *King and Duveen and Others* [1913] 2 KB 32; *Ganda Edible Oils; dan Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 dirujuk (lihat perenggan 36).

(5) Tiada konflik di antara keputusan Mahkamah Agung dalam *Ganda Edible Oils* dan keputusan-keputusan Mahkamah Rayuan dalam *Hartela* dan *Pembinaan LCL*. Ketiga-tiga kes boleh dibaca secara harmoni. Malah, sekiranya terdapat mana-mana konflik di antara kes-kes tersebut, keputusan Mahkamah Agung (seperti yang disokong oleh Mahkamah Persekutuan dalam *Intelek Timur*) akan diberikan kepentingan. Oleh itu persoalan 4 diakui (lihat perenggan 40).

(6) Tidak terdapat apa-apa yang menunjukkan majoriti penimbang tara membuat keputusan sesuka hati tanpa merujuk kepada KPP. Majoriti penimbang tara telah menguruskan perkara tersebut dengan betul dengan mentafsirkan KPP dalam cara yang dipersetujui pihak-pihak. Oleh itu, majoriti penimbang tara yang bijaksana tidak memberikan award berdasarkan 'sudut komersial dan/atau amalan-amalan industri'. Majoriti penimbang tara hanya menyatakannya sambil lalu, sebagai alasan sampingan atau sokongan (lihat perenggan 49).

(7) Fakta bahawa persoalan-persoalan fakta dipertimbangkan oleh majoriti penimbangtara adalah tidak penting. Fakta tersebut tidak mengubah sifat khusus rujukan. Tidak terdapat elemen-elemen kesalahan undang-undang dalam award yang diputuskan oleh majoriti penimbangtara. Mereka menjawab persoalan undang-undang yang diutarakan kepada mereka dan ini sahaja yang mereka perlu lakukan. Persoalan 5 oleh itu dijawab secara negatif (lihat perenggan 54 & 56).]

Notes:

For cases on arbitration agreement in general, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1381–1455.

For cases on setting aside award, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1628–1692.

Cases referred to

A v B [2007] 1 Lloyd's Rep 237 (refd)

A v B (No 2) [2007] 1 Lloyd's Rep 358 (refd)

Absalom (FR) Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592, HL (refd)

African & Eastern (Malaya) Ltd v White, Palmer & Co, Ltd (1930) 36 Ll L Rep 113 (refd)

A *Bahamas International Trust Co Ltd v Threadgold, CA* [1974] 1 WLR 1514, CA (refd)
Black Clawson International Ltd v Papierwerke Aschaftenburg AG [1981] 2 Lloyd's 446 (refd)
C v D [2007] EWCA Civ 1282; [2007] All ER (D) 61, CA (refd)
B *Cairn Energy India Pte Ltd & Anor v The Goverment of India* [2009] 6 MLJ 795, CA; [2010] 2 CLJ 420 (refd)
Channel Tunnel Group Ltd and Anor v Balfour Beauty Construction Ltd [1993] AC 334, HL (refd)
Compagnie D'Armement Maritime SA v Compagnie Tunisienne De Navigation
C *SA* [1971] AC 572, HL (refd)
Crystal Realty Sdn Bhd v Tenaga Insurance [2008] 3 CLJ 791, CA (refd)
Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs Government of Pakistan (Respondent) [2010] UKSC 46, SC (refd)
Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng [1996] 1 MLJ 178; [1996]
D 2 CLJ 249, CA (refd)
Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428, SC (refd)
Government of India v Cairn Energy India Pte Ltd & Ors [2003] 1 MLJ 348, HC (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA
E (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)
King and Duveen and Others [1913] 2 KB 32 (refd)
Kuwait Airways Corp v Iraqi Airways [2002] 2 AC 883, HL (refd)
F *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23; [2010] 1 CLJ 137, FC (refd)
M/s Dozco India Ltd v M/s Doosan Infracore Co Ltd (Arbitration Petition No 5 of 2008) 2010 (9) UJ 4521, SC (refd)
National Coal Board v William Neill & Son (St Helens) ltd [1984] 1 All ER 555
G (refd)
Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)
Pioneer Shipping v BTP Tioxide Ltd (The Nema) [1982] AC 724, HL (refd)
Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak [2004] 2 MLJ 414;
H [2004] 2 CLJ 186, CA (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Sumitomo Heavy Industries Ltd v ONGC Ltd AIR 1998 SC 825, SC (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and
I *other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)
The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd [2000] 6 MLJ 433, HC (refd)
Volvo Canada Ltd v International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) 99 DLR (3d) 193 (refd)

Legislation referred to

Arbitration Act 1952 ss 24(2), 37
Arbitration Act 1979 [UK]
Courts of Judicature Act 1964 s 96(a)

Cyrus Das (Saranjit Singh and Lam Ko Luen with him) (Saranjit Singh) for the appellant.
Vinayak Pradhan (Darryl Goon, Ooi Huey Miin and Angeline Lee with him) (HM Ooi Associates) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal which had on 15 September 2009 decided in favour of the respondents.

[2] The facts of this case have been succinctly dealt with in the two separate judgments of the Court of Appeal. (See *Cairn Energy India Pte Ltd & Anor v The Goverment of India* [2009] 6 MLJ 795; [2010] 2 CLJ 420). As such we will only make reference to the relevant facts and chronology for purposes of clarity in this judgment.

[3] The core of the dispute is related to an oil and gas joint venture. The appellant had entered into a joint venture with several private companies, including both respondents. The respondents were involved in the development of an area described as 'Ravva Field' which is situated off the coast of India. A production sharing contract ('PSC') was entered into by the parties to this effect.

[4] The salient provisions of the PSC read:

Article 3

3.3 ONGC Carry

In consideration of ONGC having paid the Past Costs, the Companies covenant to ONGC that they shall:

(a) during the Transfer Period, pay the share of Exploration Costs, Development Costs and Production Costs incurred by the Operator; and

(b) after the Transfer Period, pay the share of Contract Costs,

that would otherwise be payable by ONGC, in the proportion that their respective Participating Interests bear to their total Participating Interests, until such time as the amount paid by the Companies pursuant to this Article 3.3 equals the amount that is equivalent to the Companies' total Participating Interest share of the difference between Past Costs and Transfer Period Net Revenue PROVIDED THAT the

Companies' obligations under this Article 3.3 shall not exceed the sum of thirty three million US Dollars (US$33 million) less an amount equivalent to the Companies' total Participating Interest share of Transfer Period Net Revenue to which but for Article 7.5(c) the Companies would otherwise be entitled. Thereafter, Contract Cost shall be borne and paid by the Companies and ONGC in proportion to their Participating Interest.

Article 15

Recovery Of Costs For Oil And Gas

15.1Contractor Entitled to Recover Contract Costs and Past Costs

The Contractor shall be entitled to 100% of the total volumes of Petroleum produced and saved from the Contract Area in accordance with the provisions of this Article until the value of such Petroleum entitlement, after deduction of all applicable levies including all Royalty and Cess paid in respect of Petroleum produced and saved from the Contract Area, is equal to Contract Costs together with Past Costs. For the avoidance of doubt, it is agreed that Past Costs shall not exceed the sum of fifty five million US Dollars ($US55 million) for the purposes of cost recovery.

Article 16

Production Sharing Of Petroleum Between Contractor And Government

16.1Profit Petroleum Determined by PTRR Method

(a) The Contractor and the Government shall share in the Profit Petroleum from the Contract Area in accordance with the provisions of this Articles.

(b) The share of Profit Petroleum, in any Year, shall be calculated for the Contract Area on the basis of the Post Tax Rate of Return actually achieved by the Companies at the end of the preceding Year for the Contract Area as provided in Appendix D.

Appendix D

(Articles 16.4)

Calculation Of The Post Tax Rate Of Return For Production Sharing Purposes

1 In accordance with the provisions of Article 16, the share of the Government and the Contractor respectively of Profit Petroleum from any Filed in any Year shall be determined by the Post Tax Rate of Return (hereinafter referred to as PTRR) earned by the Companies from the Contract Area at the end of the preceding Year. These measures of profitability shall be calculated on the basis of the appropriate net cash flows as specified in this Appendix D.

2 In order to assess the PTRR earned by the Company(ies) in the Contract Area over any period up to the end of any particular Year, the following net cash flow of the Company(ies) arising from the Contract Area for each Year separately will first be calculated as follows:

(i) Cost Petroleum entitlement of the Companies as provided in Article 15; plus

(ii) Profit Petroleum entitlement of the Companies as provided in Article 16; A

plus

(iii) the Companies' share of all incidental income (of the type specified in Section 3.4 of the Accounting Procedure) arising from Petroleum Operations; B

less

(iv) the Companies' share of those Production Costs incurred on or in the Contract Area;

less C

(v) the Companies' share of those Exploration Costs (if any) incurred in the Contract Area;

less

(vi) the Companies' share of Development Costs in the Contract Area, which, for the purposes of this paragraph 2(vi), shall be all of the Development Costs without regard to the provisions of Articles 15.5(b); D

less

(vii) the notional income tax, determined in accordance with paragraph 7 of this Appendix, payable by the Companies on profits and gains from the Contract Area. E

provided, however, that any costs or expenditures which are not allowable as provided in Section 3.2 of the Accounting Procedure shall be excluded from Contract Costs and disregarded in the calculation of the annual net cash flow. F

[5] Dispute arose regarding the costs recoveries claimed by the respondents and the calculation of post tax rate of return (PTRR) as computed by the respondents. The parties therefore referred six points for arbitration. Four of them were decided in favour of the appellant and the remaining two were decided in favour of the respondents. The appellant challenged one of the points decided in favour of the respondents, namely, 'whether the companies are entitled to include in the accounts, for the purposes of PTRR calculation in accordance with the provisions of Article 16 and Appendix D of the said contract, sums paid by the companies in accordance with Article 3.3 of the said contract'. G H

[6] On this point, the majority of the arbitral tribunal found that 'the companies are entitled to include in the accounts, for the purposes of PTRR calculation (in accordance with the provisions of Article 16 and Appendix D of the said [contract]), sums paid by the companies in accordance with Article 3.3 of the said contract'. I

[7] On the application by the respondent to set aside and/or to remit for the

reconsideration of the arbitral tribunal, of a part of the arbitral award at the High Court, Kuala Lumpur, the learned judicial commissioner found the issue to be a mixed question of fact and law which permitted him to look into the decision of the arbitral tribunal. The learned judicial commissioner in allowing the application concluded that there was a manifest error of law on the fact of the award and that the arbitral tribunal had erred in coming to its decision on the said issue. The respondents appealed to the Court of Appeal.

[8] The learned judges of the Court of Appeal were unanimous in their final outcome but divided in their approach. The judgment of the learned judicial commissioner was set aside. The majority ruled that the issue in question was a question of construction which was a specific question of law and therefore it was not permissible for the court to scrutinise the award of the arbitral tribunal on that point. However, the minority view was that the question involved a mixed question of fact and law which permitted the court to scrutinise the award, but nevertheless found there was no error of law committed by the arbitral tribunal.

[9] Thus, against the decision of the Court of Appeal the appellant appeals to the Federal Court. Leave was granted on the following five questions:

1 Where an award from an international commercial arbitration is submitted for review before the Malaysian courts under s 24(2) of the Arbitration Act 1952, and the contract provides for the application of one foreign law to govern the contract (namely the laws of India) and another foreign law to govern the arbitration agreement (namely the laws of England), is it proper for the Malaysian Court to apply Malaysian law exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration is in Malaysia?

2 If English law is to apply as the choice of the parties, whether the appropriate law is that as stated in the English Arbitration Act 1979 (amending the English Arbitration Act 1950) which provides for an appeal to the High Court on any question of law arising out of an award?

3 If Malaysian law is to apply to determine the scope of intervention, is the common law limitation adopted in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 between a specific reference and a general reference as determining scope of intervention valid in the light of s 24(2) which carries no limitations by itself or where a construction question is involved?

4 Whether the scope of intervention in arbitration awards under Malaysian Law is that stated in *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 given that conflicting positions are presently being taken by the Court of Appeal over the question? For example, the Court of Appeal

in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 and *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 has expressly rejected the *Ganda Edible Oils* ratio but the Court of Appeal in *Crystal Realty Sdn Bhd v Tenaga Insurance* [2008] 3 CLJ 791 has endorsed it?

5 Whether the Court of Appeal, as did the majority arbitrators before them, err in law in failing to appreciate that the paramount rule in the construction of contracts under Indian law is to ascertain the intention of the parties to the bargain and for this purpose rely on the definition to words given in the contract itself as opposed to reliance on commercial sense or industry practice as aids to construction?

[10] During the hearing of this appeal submissions on questions 1 and 2 were taken together. Likewise questions 3 and 4 were also dealt with together while question 5 was dealt with on its own. As such we will consider those questions in the same sequence.

[11] However, before proceeding to deal with the merit of this appeal we should dispose of one preliminary issue raised by learned counsel for the respondents.

PRELIMINARY ISSUE

[12] The respondents submitted that the above questions (especially questions 1–4) were not decided by the Court of Appeal and are now being raised for the first time before the Federal Court. It was argued that these questions should not be entertained by this court. The respondents placed their reliance on s 96(a) of the Courts of Judicature Act 1964 (the Act) and the recent judgment of this Court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor* [2011] 1 MLJ 25; [2011] 1 CLJ 51.

[13] With respect, we do not think we should revisit the basis for the grant of the leave including questions one to four. The respondents ought to have put forth such argument at the hearing of the leave application. The appellant in its submission state the respondents did raise this at the leave stage. In any event we are of the view that once leave has been granted by this court in the first instance, it ought to be respected at the appeal proper stage (see *Terengganu Forest Products Sdn Bhd*). It is noteworthy to mention that the leave stage is but a mere first hurdle for an appellant/applicant. During the hearing of the appeal proper it is for the parties to fully canvass their respective positions vis-a-vis the judgment of the Court of Appeal. As such we do not find it necessary to rule on the preliminary issue.

[14] We now proceed to consider the questions before us.

QUESTIONS 1 AND 2

[15] In our view question 2 would only come into effect if question 1 is decided in favour of the appellant. Question 1 primarily is on the effect of the seat of arbitration. The appellant seeks to argue that English law applies and thus the Court of Appeal ought to have applied the appellate power allowed under the Arbitration Act 1979 of the United Kingdom, and not the common law rule of distinguishing between a general reference and a specific reference.

[16] The majority of the Court of Appeal refused to interfere as it had found the matter to be a specific reference. The majority also was of the view that even if they were wrong on that point, there was still no error of law committed by the arbitral tribunal for them to interfere with. The minority view was that the issue was a mixed question of law and fact and therefore it was open for the court to interfere, but declined to do so as there was no error of law.

[17] The respondents on the other hand relies on the parties' specific choice of choosing Kuala Lumpur, Malaysia as the seat of arbitration and thus effect must be given to that choice. The respondents also contend that it was the appellant who had filed the case in the Malaysian court and had relied on Malaysian law in doing so. No reference was made to English law. The respondents also submitted that if the appellant is of the view that English law ought to apply, they should have filed their challenge before the English court. It was further argued that in the courts below, the parties had relied heavily on Malaysian law without any such opposition. The appellant conceded this in their submission before this court but sought to rely on the case of *Bahamas International Trust Co Ltdv Threadgold* [1974] 1 WLR 1514 to say that an erroneous reading or concession on the interpretation of a contract is not binding and it is open to a court to apply the correct law or construction of the contract.

[18] Now, the parties agreed on certain terms in the PSC. By article 33.1 of the PSC, the parties chose Indian law as the proper law of the contract. By article 34.12, they chose English law as the law to govern the arbitration agreement. By article 34.9, the arbitration proceedings were to be governed by the UNCITRAL Model Law, and that the seat of the arbitration proceedings was to be Kuala Lumpur. It is not uncommon, albeit rare, for parties to agree as such—see *Black Clawson International Ltd v Papierwerke Aschaftenburg AG* [1981] 2 Lloyd's 446 at p 453; *Channel Tunnel Group Ltd and Anor v Balfour Beauty Construction Ltd* [1993] AC 334.

[19] At the outset we do not agree with the contention of the respondents

that the appellant should have filed its challenge before the English court if it seeks to rely on English law. Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency.

[20] This principle can be extracted from the House of Lords decision in *Kuwait Airways Corp v Iraqi Airways* [2002] 2 AC 883 per the speech of Lord Nicholls at p 1078:

> The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law.

(See also *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46).

[21] The next point to consider is whether the parties intended English law or Malaysian law to be the 'curial law', ie the law applicable for a challenge to an arbitral award, and in this case would include the Arbitration Act 1952, now replaced by the Arbitration Act 2005. The appellant relies heavily on a decision by the Indian Supreme Court, namely *Sumitomo Heavy Industries Ltd v ONGC Ltd* AIR 1998 SC 825 (recently endorsed by the Supreme Court of India in *M/s Dozco India Ltd v M/s Doosan Infracore Co Ltd (Arbitration Petition No 5 of 2008)* 2010 (9) UJ 4521 (SC), which states that the 'curial law' seizes to have effect once the arbitral tribunal has handed down its award. The Supreme Court of India in *Sumitomo Heavy Industries* said the following at paras 12, 15 and 16:

> The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is 'functus officio'.
>
> The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration.
>
> The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement.

[22] Thus, the appellant submits that English law applies for the setting

aside of the award since the curial law of the seat of arbitration had lapsed upon the grant of the award. The respondents reject this approach and argues that the curial law effectively remains to be Malaysian law for the setting aside of the award.

[23] We are inclined to agree with the contention of the respondents. Our courts had in a prior occasion taken the view that the seat of the arbitration is the place where challenges to an award are made. In *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23; [2010] 1 CLJ 137. this court referred to the English case of *A v B* [2007] 1 Lloyd's Rep 237 which decided that challenges are to be made at the courts of the seat of arbitration. Thus, for now we find no reason to depart from the current position of the law.

[24] Indeed in *C v D* [2007] EWCA Civ 1282; [2007] All ER (D) 61 Longmore LJ at para 17 said this:

> *It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award.* As the judge said in para 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the 'curial law' necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v B* [2006] EWHC 2006 (Comm); [2007] 1 All ER (Comm) 591; [2007] 1 Lloyd's Rep 237and *A v B (No 2)* [2007] EWHC 54 (Comm); [2007] 1 All ER (Comm) 633; [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para 111):
>
> ... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.
>
> That is, in my view, a correct statement of the law. (Emphasis added.)

[25] It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied.

[26] In *Compagnie D'Armement Maritime SA v Compagnie Tunisienne De*

Navigation SA [1971] AC 572 Lord Diplock had said that the *express choice of forum by the parties to a contract necessarily implies an intention that their disputes shall be settled in accordance with the procedural law of the selected forum and operates as if it were also an express choice of the curial law of the contract*.

(See also Sundra Rajoo and WSW Davidson in *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia,* Sweet & Maxwell, 2007. Although it discusses the Arbitration Act 2005 it also makes reference (at p 106) to the general point that where the seat of arbitration is in Malaysia the High Court in Malaysia will intervene *to lend support for issues arising under for example,* inter alia, s 37 which deals with setting aside awards).

[27] Accordingly our answer to question one is in the affirmative. As such there is no necessity to answer question two.

QUESTION 3 AND 4

[28] Question 3 deals with the common law distinction between a specific reference and a general reference for arbitration in determining the scope of intervention by the courts (see *Sharikat Pemborong Pertanian*). The appellant submits that such a distinction cannot be found in the words of s 24(2) of the Arbitration Act 1952. Thus such a distinction ought to be questioned. In short the appellant urged this court to depart from the current long line of authorities adopting such a distinction.

[29] This court in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 CLJ 743 upheld the distinction that was made in *Sharikat Pemborong* in the following terms — 'As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often than not, questions of law arise from his findings of fact. It is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows — 'It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'.'

[30] With respect we are not persuaded that we should depart from the long line of authorities holding such a distinction. Thus, where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no

such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award' (see *Sharikat Pemborong Pertanian*). (See also *King v Duveen* [1913] 2 KB 32 and *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592).

[31] The next point requiring to be considered is:

(a) whether the cases of *Ganda Edibile* and *Intelek Timur* introduced a ground for challenge in cases where a specific reference was made for arbitration, namely, that an act of illegality has been committed by the arbitrator, such as deciding on evidence which was not admissible, or on principles of construction which the law does not countenance; and

(b) whether the question of construction of a contract is a question of law, which if specifically referred to arbitration, ought to fall within the ambit of the above distinction as laid down in *King v Duveen*.

[32] With reference to item (a), in *Ganda Edible Oils*, Barakbah SCJ stated the following:

> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

A substantial portion of these words were reproduced by this court in *Intelek Timur*. However, it must be pointed out that both cases expressly endorsed *Sharikat Pemborong*.

[33] In our view the Supreme Court in *Ganda Edible Oils* and the Federal Court *Intelek Timur* did not introduce any new ground for challenge. Both cases merely reiterated a fundamental principle of law, to wit, that if a decision of an arbitrator is tainted with illegality, it is always open for challenge. Thus, even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. It must be stressed here that the award must be tainted with some sort of illegality. It must also be emphasised that the word 'may' is used here, in that the award may be set aside. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it.

[34] As for item (b), the Supreme Court in *Ganda Edible Oils* did state that construction is, *generally speaking*, a question of law. In our view all matters regarding the construction of a document is a question of law. It may very well be that in some cases, other matters are brought up for consideration which may involve questions of fact, but where the matter solely referred to is the construction of a document, it must be said to be solely a question of law. In our view, the words *generally speaking* used by the Supreme Court are to cater for the above situation where questions of fact are involved.

[35] In *Bahamas International Trust* Lord Diplock in the course of his speech stated that 'the construction of a written document is a question of law' (see also *Pioneer Shipping v BTP Tioxide Ltd (The Nema)* [1982] AC 724 and *National Coal Board v William Neill & Son (St Helens) Ltd* [1984] 1 All ER 555).

[36] To reiterate we hold that the construction of an agreement is a question of law. It follows that if the construction of an agreement is the sole matter that is referred to arbitration, it is not open for challenge in the broad sense. This is in accordance with *Sharikat Pemborong* and *King and Duveen and Others*. Nevertheless, it still may yet be challenged in extremely limited circumstances, ie if the award is tainted with illegality, as was observed in *Ganda Edible Oils* and as approved and followed in *Intelek Timur*. Our answer to question 3 is therefore in the affirmative.

[37] In respect of question 4 it calls for the consideration of the decision in *Ganda Edible Oils* in the light of the decisions in *Hartela* and in *Pembinaan LCL* which according to the appellant had rejected the said Supreme Court decision, and the case of *Crystal Realty* which had endorsed the same.

[38] To answer this question, a careful reading of the said three decisions (excluding *Crystal Realty*) is necessary. The Court of Appeal in both *Hartela* and *Pembinaan LCL* clearly was aware that the Supreme Court decision was binding upon them. Upon careful reading of the said cases, we are of the view that all three decisions can be read harmoniously. We need only refer to the case of *Government of India v Cairns Energy India Ptv Ltd & Ors* [2003] 1 MLJ 348, a case although involving the same parties but on a different matter altogether (and not related to the present proceedings), wherein the High Court stated as follows:

> I am of the view, with the greatest of respect, that the interpretation placed by the Court of Appeal in the case of *Hartela Contractors Ltd* on the Supreme Court's judgment in the case of *Ganda Edible Oils* is incorrect. A clear reading of *Ganda Edible Oils* (the relevant passages which were reproduced earlier) clearly reflect that the courts have the right to intervene where the arbitrator has made wrong inferences of fact or has considered inadmissible evidence, otherwise there was no

reason for it to state the 'two questions that should have arisen before the judge …'. The apparent conflict of both decisions have been judiciously considered in the case of *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd*, in particular at pp 447–448. The learned High Court judge concluded that both cases can be read harmoniously as both *Hartela Contractors Ltd* and *Ganda Edible Oils* have decided different principles, namely:

(a) *Hartela Contractors Ltd* decided that inadmissible evidence must result in violations of the rules of evidence relating to natural justice which is repugnant to one's sense of justice or fairness before an award can be set aside (see p 448, para A–B of authority);

(b) *Ganda Edible Oils* decided that failure to analyse and appraise evidence will vitiate an award if the evidence is material, relevant and had gone to affect the award.

I would adopt the harmonious interpretation pronounced by the judge in the case of *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* …

[39] It should be noted that *The Government of Sarawak v Sami Mousawi-Utama Sdn Bhd* [2000] 6 MLJ 433 which was decided by the High Court, has since been upheld on appeal by the Court of Appeal (see *Sami Mousawi-Utama Sdn Bhd v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414; [2004] 2 CLJ 186).

[40] As such, we hold that there is no conflict between the Supreme Court decision in *Ganda Edible Oils* and the Court of Appeal decisions of *Hartela* and *Pembinaan LCL*. All three cases can be read harmoniously. For completeness, we hold that even if there is any conflict between the said cases, the decision of the Supreme Court (as endorsed by this court in *Intelek Timur*) would, for obvious reasons, prevail. Our answer to question four is therefore in the affirmative.

QUESTION FIVE

[41] Question five relates to whether the Court of Appeal in coming to its decision, as did the majority arbitrators, applied the wrong approach when construing the PSC (contract).

[42] In order to properly answer this question five it may be helpful to first note what was said in *Sharikat Pemborong* at p 211:

It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears

on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592, *British Westinghouse Electric & Manufacturing Co Ltd v Underground Railways Co of London Ltd* [1912] AC 673 *Hodgkinson v Fernie* 3 CB (NS) 189; 140 ER 712, and *Attorney-General for Manitoba v Kelly and others* [1922] 1 AC 268 281 PC. *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395 411, and *In re King and Duveen* [1913] 2 KB 32 are instances of the latter.

[43] And in *Ganda Edible Oils*, it was pointed out that where the matter referred to for arbitration is a question of construction, it is a question of law and comes within the category of specific reference. The award of the arbitrator cannot therefore be set aside unless there is illegality 'as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award'.

[44] In this case it is not in dispute that the matter referred for arbitration is one of construction of the terms in the PSC, a question of law and thus a specific reference. Therefore it is necessary for the appellant to show illegality.

[45] Learned counsel for the appellant submitted that under Indian law, to which the PSC was subject to, the paramount rule is to determine the intention of the parties and not to rely on the commercial factors or industry practices as aids to construction. Learned counsel argued that the majority arbitrators failed to adhere to the paramount rule. He relied on the passage in the award which reads:

The conclusion is that granting the words in Appendix D(2)(iv) – (vi) their natural meaning accords with the general scheme of Articles 15 and 16 and, as well, *commercial sense*. There is simply no basis for reading Post Tax Rate of Return as excluding those expenses incurred by the Companies under Article 3.3 after the Effective Date. (Emphasis added.)

[46] The respondents contend that the majority arbitrators did not take into consideration commercial and industry factors in coming to its decision but only referred to them in passing.

[47] Now, being a specific reference, all that is left to be considered is:

(a) whether the majority arbitrators did in actual fact place reliance on the commercial sense and/or industry practices as aids of construction; and

(b) if the above is in the affirmative, whether this amounts to an illegality of which the courts are permitted to intervene.

[48] The majority of the Court of Appeal was of the view that the majority arbitrators did not take into account the commercial sense or industry practices in coming to its decision. It stated that 'the Arbitral Tribunal merely said in conclusion that its award accorded not only with arts 15 and 16, but also with commercial sense. Paragraph 261 could not possibly be read that the Arbitral Tribunal had constructed the PSC on the basis of commercial sense'.

[49] We have no reason to disagree with the majority of the Court of Appeal. The reference to 'commercial sense' was merely incidental and supportive. There is nothing to indicate that the majority arbitrators had proceeded on a frolic of their own with total disregard to the PSC. On the contrary, we are of the view that the majority arbitrators rightly dealt with the matter by interpreting the PSC in the manner as the parties had agreed upon.

[50] Quite a similar situation confronted the Supreme Court in *Ganda Edible Oils* and it was approached in the following words:

> At para 9 of the award, the arbitrator wrote:
>
> A buyer in receipt of a bad tender must decide immediately to accept or reject the same. If a buyer could accept or reject after 8–15 days there would be chaos in the trade. Clearly this cannot prevail.
>
> That was the passage that led the trial judge to conclude that the arbitrator in making the award relied on custom of trade, and in the circumstances therefore it was immaterial whether s 42 of the SGO applied or not.
>
> It was submitted by the counsel for the appellant that the arbitrator could not be relying on custom of trade without making a finding as to what the custom was. The learned counsel for the respondent conceded that the issue of custom and usage was not contended by either party before the arbitrator. He further submitted that the arbitrator could have relied on the facts and circumstances of the case without the necessity of resorting to ss 37 and 42 of the SGO. We are of the view that the passage at para 9 cannot by itself alter the arbitrator's ground based on the provision of the SGO into that of custom of trade. He was only expressing his view based on the facts and circumstances of the case as described in the preceding paragraphs of his award, of the effect of unreasonable delay in rejecting the tender.
>
> One has to understand what is meant by 'custom of trade' before dealing with the subject. A custom is a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality. It is distinguishable from particular trade or local usages which have been imported as express or implied term into commercial or other contracts.
>
> No doubt s 37(4) of the SGO makes the provisions of the section to be subject to any usage of trade, special agreement or course of dealing between the parties. The arbitrator may apply his own knowledge of the usage, but before that can be done, there must be sufficient material for its inclusion. It follows that where persons execute a contract under circumstances governed by usage, the usage when proved,

must be considered as part of the agreement. In general, every usage must be notorious, certain and reasonable and must not offend against the intention of any statute. By notorious, it means that it has acquired such notoriety in a particular branch of trade or business or amongst the class of persons who are affected by it, that any person who enters into a contract affected by the usage, must be taken to have done so with the intention that the usage should form part of the contract. By certainty, usage is required to be as certain as the written contract itself. It must be uniform and reasonable before it can be imported into a contract. (*Halsbury's Laws of England,* (4th Ed), Vol 12, at pp 4, 30 and 33). In the light of the above, we agree that the subject of custom of trade or usage was never an issue in the arbitration case. In the absence of any proof expressly or by implication as to the particular custom being a part of the agreement which in turn was neither disputed nor exhibited in the record before us, we are of the view that the learned judge was wrong in concluding that the arbitrator based his finding on custom of trade.

[51] Therefore, adopting the same rationale, we find that the learned majority arbitrators did not base their award on 'commercial sense and/or industry practices'. As was said earlier, at the very most the majority arbitrators merely mentioned it in passing; as an incidental or supportive ground.

[52] We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned majority arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.

[53] And as Scrutton LJ put it '... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment' (see *African & Eastern (Malaya), Ltd v White, Palmer & Co, Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178; [1996] 2 CLJ 249).

[54] The fact that questions of fact were considered by the majority arbitrators is quite immaterial. That by itself does not alter the specific nature of the reference. The decision of the Supreme Court of Canada in *Volvo Canada Ltd v International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* (UAW) 99 DLR (3d) 193 is instructive on this point. Laskin CJ at p 206 stated as follows:

A However difficult it may be at times to determine whether a specific question has or has not been referred, I think it is more likely to be such a question where, as here, a policy question has been put to the arbitrator. Moreover, as Barwick CJ put it in the *NSW Mining Co* case, it is the nature of the question that determines the matter and that is not altered even if the arbitrator has to find some facts in order to decide it. I am satisfied in this case, as were the courts below, that the arbitrator was faced with answering a specific question of law.

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[55] Accordingly, we find that there are no elements of illegality in the award handed down by the majority arbitrators. And in this regard, we quote the C words of Martland J in *Volvo Canada Ltd* — 'I agree with the Chief Justice that the application of the statement in the circumstances of the present case would not entitle the court to set aside the award. The arbitrator did not proceed illegally. He did answer the question of law put to him, as he was required to do'.

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[56] Similarly, we find that the majority arbitrators in the present case did not proceed illegally. They answered the question of law as was put to them and that was all that was required of them. Our answer to question five is therefore in the negative.

E

[57] For the above reasons, this appeal is therefore dismissed with costs.

Appeal dismissed with costs.

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Reported by Kanesh Sundrum

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